No. SC85945

IN THE SUPREME COURT OF MISSOURI

JOHN IGOE,

PLAINTIFF/APPELLEE

vs.
THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS of the STATE OF MISSOURI, AND THE DIVISION OF WORKERS COMPENSATION of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS of the STATE OF MISSOURI

DEFENDANTS/APPELLANTS

On Appeal from the Circuit Court of the City of St. Louis, Twenty-Second Judicial Circuit, State of Missouri Honorable Patricia L. Cohen, Judge

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APPELLANTS' SUBSTITUTE REPLY BRIEF

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I.

The Trial Court erred in denying defendants' motion to transfer venue because venue was not proper in the City of St. Louis.

It should come as no surprise that parties to lawsuits in this state will incur considerable costs attempting to secure or avoid venues that are perceived as favoring a party in the case. In each case the proponent of the perceived favorable venue incurs a risk that their venue selection will be reversed on appeal. Defendants ask the Court to hold, as did the Court of Appeals, that venue was improper and impose upon Igoe the risk he intentionally bore in selecting this improper venue. Igoe says he should not bear this risk because defendants failed to seek relief from the trial court's venue order by seeking a writ of prohibition or mandamus. Respondent's Substitute Brief (hereafter Igoe Brief), p. 23. Missouri law is to the contrary on this subject.

After denial of a motion for transfer and/or dismissal for improper venue, "a writ of mandamus or prohibition *may* be an appropriate remedy to correct improper venue, but *neither is an exclusive remedy*." *Carey v. Pulitzer Publishing Co.*, 859 S.W.2d 851, 854 (Mo.App.E.D. 1993) (emphasis added).

This Court has also rejected the notion that a writ of prohibition is the required remedy to review an improper venue decision. In *State ex rel. State of Missouri v. The Honorable Steven R. Ohmer,* No SC85619, Missouri sought a writ of prohibition to review a City of St. Louis' Circuit Judge's denial of a motion asserting improper venue. The petition was denied

in a per curiam order, noting, "[e]xtraordinary relief is not available where the law provides a remedy by a later appeal." Order, October 13, 2003, Reply Appendix at 1.

Missouri law does not support Igoe's contention that defendants waived their venue objection by failing to seek an extraordinary writ to review the trial court's venue order.

Igoe criticizes defendants' untimeliness argument and asserts his own argument that the motion to transfer venue was untimely. Neither argument was presented to the trial court, nor were they made to the Court of Appeals (and, thus, are in derogation of Rule 83.08(b)). Defendants will withdraw their argument that Igoe's response to the motion to transfer venue was untimely and would suggest that Igoe's argument that the motion was untimely filed as to the Defendant Division should similarly be ignored. Igoe's point should also be ignored because the evidence supporting it is not found in the record and the record is irregular. The trial court ruled the venue motion filed by both defendants on the merits. Furthermore, Igoe's Supplemental Legal File purportedly contains a copy of the summons served on Appellant Division at SLF 2-3, and supposedly filed in the trial court on May 19, 2000, according to the circuit clerk's certification SLF 6. The problem is, according to Igoe's brief, the Appellant Division was not served until May 31, 2000 (Igoe Brief, p. 22) and, hence, the summons could not have been on file with the circuit clerk on May 19. A review of the docket sheet in the Legal File reflects that the summons served on the defendant Department was filed with the Circuit Clerk on June 16, 2000 (not June 18 as the Supplemental Legal File's certification indicates, SLF 6) and that the summons served on the defendant Division was not filed with the circuit court at any time prior to the trial court's ruling on defendants' venue motion. LF 1-2.

In fact, a review of the entire docket sheet does not disclose that the summons served on the defendant Division was ever filed. Hence, defendants request that pages 2-3 of the Supplemental Legal File be stricken. In light of the irregularities in the record and the fact that neither party disputed the timeliness of either parties' actions below, the timeliness arguments of both parties before this Court should be rejected.

Igoe does not dispute that his petition plead no venue facts. As such, defendants were obviously left to guess as to what basis for venue Igoe might have imagined. After defendants' filed their motion challenging venue, Igoe asserted that venue was proper in the City of St. Louis pursuant to Title VII. Even if this were true, which it is not as was discussed in Point I.B of Defendants' opening brief and will be discussed below, plaintiffs complaint failed to comply with the Title VII venue requirements. Title VII provides that a case may be "brought in any judicial district in the State in which the unlawful employment practice is *alleged* to have been committed," where the employment records relevant to such practice are maintained, or where the plaintiff would have worked. Here Igoe never "alleged" any venue fact from which venue could be determined in accordance with Title VII requirements. Furthermore, in utilizing the phrase "judicial district" Congress was referring to federal judicial districts, as states are not necessarily so divided, indicating Congress' intent that Title VII venue provisions only regulate venue of federal court actions. Such is the teaching of *Bainbridge v. Merchants & Miners' Transportation Co.*, 287 U.S. 278 (1932) (considering a similar use of the word "district" in the Jones Act) and *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 272, n. 6 (1991) (wherein Justice Marshall, dissenting on other grounds and citing *Bainbridge*, said that Title

VII venue provisions "would clearly not apply" in Title VII actions brought in state courts). Both these cases were cited in defendants' opening brief and Igoe's brief does not even attempt to distinguish them.

Igoe argues that the circuit court was obliged to apply the special venue provisions of Title VII based on the Supremacy Clause of Article VI of the U.S. Constitution, citing *Bunge Corp. v. Perryville Feed & Produce*, 685 S.W.2d 837 (Mo. banc 1985) and *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298 (Mo. banc 1992). Igoe Brief, p. 16-18. The Supremacy Clause and these cases are inapplicable here.[1]

The Supremacy Clause is invoked when Congress expresses or implies exclusive dominion over a particular subject, and state law conflicts or interferes with federal authority over the same subject. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 963-964 (1986); *see also, Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-319 (1981). Congress has not exercised exclusive dominion, expressed or implied, over the subject of employment discrimination. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 821 (1990) ("Congress did not divest the state courts

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[1] If the state courts were required to adopt federal venue standards, we should also adopt the federal requirement that the plaintiff has the burden to prove venue. *Grantham v. Challenge-Cook Bros., Inc.*, 420 F.2d 1182, 1184 (7th Cir. 1969). Igoe did not discharge this burden. He neither alleged any venue facts nor, in response to defendants' venue motion, provided any evidence in support of his venue selection.

of their concurrent authority to adjudicate federal [here Title VII] claims."). Title VII operates on a dual-track with state employment discrimination laws, such as the MHRA, requiring the EEOC to delay action for at least sixty days to give state agencies an opportunity to remedy the allegedly unlawful discrimination under state law prior to any federal action. *Id.* at 824. Thus, the Supremacy Clause does not apply to the case at hand because Congress has not preempted state law regarding employment discrimination. *Id.* at 825-26.

Igoe cites *Bunge Corp.* to support his proposition that pursuant to the Supremacy Clause, state courts are required to utilize Title VII's venue provisions, and therefore, asserts that MHRA's venue provision does not apply. Igoe Brief, p. 16-18. However, the federal law at issue in *Bunge* was the Federal Arbitration Act ("FAA") and the difference is significant. The United States Supreme Court has consistently held that Congress has exercised exclusive authority over certain arbitration agreements by passing the FAA based on its plenary power under the Commerce Clause. *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984); *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 395, 405 (1967). Congress has not exercised exclusive authority over employment discrimination with the passage of Title VII. *Yellow Freight* at 825-26. Furthermore, the Missouri Arbitration Act evaluated in *Bunge* actually took away rights granted by the Federal Arbitration Act. As Missouri's MHRA venue provisions do not defeat any right granted by Congress under Title VII, *Bunge* is not controlling. *See Clayco Const. Co., Inc. v. The Carondelet Dev., L.L.C.*, 105 S.W.3d 518, 523 (Mo.App. 2003). Plaintiff also cites *Anglim.* There the issue was whether the state doctrine of *forum non conveniens* should be applied to preclude litigation in the State of

Missouri of a suit involving two nonresidents in light of the federal statute that said suit could be brought in any location where the defendant is doing business. 832 S.W.2d at 301. The issue before the court was never which of two competing venue statutes should apply.

Procedural questions are determined by the state law where the action is brought. *Hemar Ins. Corp. of America v. Ryerson*, 108 S.W.3d 90, 95 (Mo.App. 2003), *citing Consolidated Financial Investment, Inc. v. Manion*, 948 S.W.2d 222, 224 (Mo.App. 1997). Unless they would defeat a substantive right created by federal law, Missouri procedural law applies in Missouri courts. *Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200, 203 (Mo.App. 1996). The determination of venue is procedural in nature. *Peoples Bank v. Carter*, 132 S.W.3d 302, 305 (Mo.App. 2004). Here, the special venue provision of the MHRA is not in derogation of Title VII under the Supremacy Clause as readily indicated by Justice Marshall's dissent in *Arabian Oil Co.*, discussed above.

II.

The trial court's entry of judgment for Igoe on his gender discrimination claims, about which the evidence was identical to that presented in his age discrimination claims, was, as Igoe admits, in error and is deeply troubling in this "judge tried" case submitted to an advisory jury.

Igoe concedes that the trial court's judgment is erroneous in that it entered judgment for plaintiff on his gender discrimination claims. Plaintiff asserts that his damages would be the same on either claim and, hence, the error is irrelevant. Here the trial court made a specific damage award on plaintiff's Title VII claim. What the trial court would have awarded as damages had the court realized that the jury had found for defendants on plaintiff's gender discrimination claim is speculative. No one can know what kind of a judgment the trial court would have entered had it understood that the defendant had both won and lost different discrimination charges on identical evidence. Under these circumstances, the judgment should be vacated and this matter remanded.

III.

The Circuit Court erred in determining that the defendants discriminated against Igoe in violation of the MHRA because Igoe failed to carry his ultimate burden of persuasion by submitting substantial evidence that he was not selected for any of the legal advisor or ALJ positions because of his age.

A. The defendants articulated a legitimate non-discriminatory reason for Igoe's nonselection.

A defendant's burden in an employment discrimination case is one of production**,** not proof. Thus, the defendant is not required to persuade the court, but need simply produce evidence of its reasons. *Krenik v. County of LeSueur*, 47 F.3d 953, 958 (8th Cir. 1995). The defendant's burden is extremely light and requires only that the defendant proffer a reason for plaintiff's nonselection. *Ottman v. City of Independence, Mo.*, 341 F.3d 751, 758 (8th Cir. 2003). Igoe argues that he established a prima facie case, but that the Defendants failed to carry their burden to articulate a nondiscriminatory reason for the decision not to hire him. Even assuming that Igoe carried his initial prima facie burden by the mere fact that he was substantially older than the other candidates selected, the Defendants satisfied their burden in offering testimony as to why Igoe was not selected: because they did not view him as one of the better candidates to facilitate the stated objections and goals of the Division, and because members of the Governor Carnahan's staff selected other applicants. See Tr. 190-91, 201-02, 203-05, 210-16.

Contrary to the facts, Igoe argues that Defendants were silent in offering any evidence as to the reason for Igoe's nonselection. He then gives that alleged silence dispositive force, citing the Eleventh Circuit's decision in *Turner v. AmSouth Bank, N.A.*, 36 F.3d 1057 (11th Cir. 1994). *Turner*, however, is not analogous to this case. In *Turner*, the person making the selection could not remember the plaintiff's interview and instead attempted to rely on after-acquired information regarding the plaintiff's credit history to show the company had not discriminated against him. Here, in contrast, Karla McLucas ("McLucas") did remember Igoe's interviews in 1997 and 1999. Tr. 205, 228-29. In addition, Thomas Pfeiffer, a member of the interview panel in 1999, also remembered Igoe's interview. Tr. 284-86. Both times, Igoe's interview was short and he did not demonstrate the qualities the selectors[2] were looking for to fill the various positions. Tr. 205-211, 285-88. McLucas testified as to what the Missouri Division of Workers Compensation (the "Division"), as instructed by members of Governor Carnahan's staff, was looking for: individuals who demonstrated enthusiasm, interest, and a capability to use the new computer technology in order to facilitate the Division's progression of efficiency into the new computer age. Tr. 190-91, 202-05. Contrary to Igoe's argument, the Defendants were not silent in offering a reason for his nonselection.

[2] While the testimony at trial was that both times members of Governor Carnahan's staff made the final decisions, the defendants have never concealed the fact that McLucas and the other members of her selection panel did not consider Igoe one of the best candidates.

The four candidates selected in 1998 demonstrated the requisite enthusiasm, interest and capability (See Tr. 210-16); Igoe did not. In 1999, when additional interviews were conducted, Igoe once again did not demonstrate the desired qualities being considered. See Tr. 229-31. Moreover, the testimony from McLucas was that Governor Carnahan's staff wanted her to identify the sponsors of each candidate. Tr. 194-95, 220. McLucas had no information that Igoe even had any sponsors or supporters. See Appellee's Appendix A7-10. While the Defendants cannot say on what basis the ultimate decisions were made other than to say they relied on instructions from Governor Carnahan's staff -- there was no evidence to suggest that the Governor's decisisons were based on age. And there can be no serious argument that it is illegitimate for a cabinet member to follow the Governor's directives. *See Zaccagnini v. Charles Levy Circulating Co.*, 338 F.3d 672, 676 (7th Cir. 2003) (company practice of hiring only individuals referred by specific union is a facially legitimate, nondiscriminatory reason for employment decision). Even if the role of the Governor's staff were not considered, the testimony of both McLucas and Pfeiffer, showed that Igoe was not deemed one of the better candidates. See Tr. 205-09, 228-29, 285-88. Defendants, therefore, carried their burden in articulating a legitimate nondiscriminatory reason for Igoe's nonselection.

B. Igoe failed to demonstrate that Defendants articulated reason for failing to select him was a pretext for age discrimination and failed to carry his ultimate burden that his nonselection was because of his age.

Once Defendants articulated a legitimate nondiscriminatory reason for Igoe's nonselection as either a legal advisor or ALJ, he was required to come forth with some proof

that the Defendants' explanation for Igoe's nonselection was a pretext for discrimination. Ultimately, the burden was on Igoe to show that his nonselection was because of his age. Even if the court believed that Defendants' articulated reason was false or incorrect, this would not be sufficient. The plaintiff must show both that the articulated reason is incorrect and that the true reason is discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Krenik*, 47 F.3d at 958.

Igoe argues that Defendants have offered inconsistent and contradictory explanations for his nonselection -- at first saying in response to the initial EEOC charge that McLucas made the decision, and then later in deposition and at trial saying that members of Governor Carnahan's staff made the final decisions. See Igoe Brief at 33. Although Igoe claims Defendants "changed their position" at trial, Igoe's Brief at 13, 33, 38, Igoe cannot claim he did not know Defendants' position. He filed a motion in limine prior to trial to preclude Defendants from asserting that they were instructed whom to hire by Governor Carnahan or members of his staff. Igoe's motion was based on the argument that Defendant "must not be allowed to use as a defense an assertion that it delegated its statutory duty to someone else." Reply Appendix, p. 2.

Further, McLucas' affidavit is not inconsistent with her later testimony. She stated in her affidavit that she was a part of the selection process and offered her recommendation as to why the four candidates ultimately selected were her choices as well. See Plaintiff's Exhibit 77. If she did not initially describe Governor Carnahan's role in the process, this does not amount to pretext for age discrimination. As the Supreme Court has recognized, the inference

of discrimination is weak or nonexistent if the circumstances show that the defendant's explanation was to conceal something other than discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (citing *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2nd Cir. 1997)). The circumstances here suggest that McLucas initially was trying to keep Governor Carnahan's office out of this matter, but they do not suggest she was covering up for age discrimination by herself or Governor Carnahan's staff. *See Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir. 1987) ("A public employee may feel bound to offer explanations that are acceptable under a civil service system. . . . [when] some less seemly reason–personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules–actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. Unless the employer acted for a reason prohibited by the statute, the plaintiff loses.").

This case is unlike the cases cited by plaintiff for the proposition that if an employer changes its explanation for its action, an inference of pretext can be drawn. Igoe Brief at 38. In both *Newhouse v. McCormick*, 110 F.3d 635 (8th Cir. 1997) and *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061 (8th Cir. 1988), the plaintiffs had long histories of superior job performance for their respective companies and both companies gave numerous inconsistent or evasive reasons for their actions taken towards the plaintiffs. Here, Igoe had experience in the worker's compensation field, but not as a highly successful ALJ or a legal advisor for Defendants. And McLucas did not give numerous inconsistent or evasive reasons for not

hiring him. At worst, she initially omitted mentioning the role of Governor Carnahan's staff in the decision.

Moreover, none of the evidence at trial contradicts McLucas' assessments of Igoe. Igoe refers to McLucas' notes on his first interview to support his assertion that he did in fact express an interest in the work and making improvements to the system. Igoe Brief at 33. But Igoe's statement that the position interested him because the Division "needs experienced workers' compensation help and he wanted to pay back the Bar to pick up an oar and move it forward"did not demonstrate these qualities to his evaluators. It suggests, instead, that Igoe thought so well of himself that improvements to the system would naturally flow just by hiring him.

Igoe also argues that McLucas' assessment that what interested him most about the position was the judicial retirement plan and being in a position of leadership was a pretext for age discrimination because, according to Igoe, her interview notes contain no such statements. Igoe Brief at 35. But McLucas' hand-written interview notes, taken at the time of Igoe's first interview in 1997, include those answers to question # 23. Plaintiff's Exhibit 86, Reply Appendix p. 7. Then Igoe attempts to confuse this Court by referencing another candidate during the second round of interviews in 1999, who also expressed interest in the retirement plan, Michael Moroni. Igoe Brief at 35. There was no evidence, however, that Michael Moroni, who was ultimately selected by Governor Carnahan's staff, was actually viewed by McLucas, or any member of her panel for that matter, as being one of the best candidates for the position he received. The panel ranked him last. Tr. 316. Moreover, it was not this

statement regarding retirement alone that prevented Igoe from being viewed as one of the best candidates for the positions, it was his overall interview performance. McLucas testified regarding Igoe that both his interviews were short. Tr. 205-06, 229. The time allowed for each interview was designed to "try and tease out" what the candidate knew about the Division's whole process and whether they understood the strategic vision. See Tr. 206, 208-09. The brevity of Igoe's interviews suggests he did not verbalize or demonstrate completely an understanding of the entire workers' compensation process or the stated vision.

Igoe also argues that, contrary to McLucas' assessment, he was able to clearly distinguish between an ALJ and a Article V judge. McLucas' notes, however, do not show that he really did distinguish any difference. And Igoe's experience in the worker's compensation field notwithstanding, there is no evidence that he articulated an understanding of the difference at the interview. Igoe stated in his 1997 interview that ALJ's "cannot rule on constitutional issues." See Plaintiff's Exhibit 74. In contrast, Margaret Landolt, one of the candidates selected, appeared to more clearly distinguish the differences: she explained that the ALJ's role was more informal, the rules of evidence were relaxed, they deal with more unrepresented claimants, cases are resolved quickly and usually do not have to be appealed. See Plaintiff's Exhibit 74.

Igoe suggests that because the criteria for hiring an ALJ are subjective, he should prevail because the objective measures "indicate plaintiff is more qualified than those who were offered jobs." Igoe Brief at 36. Again, Igoe's objective measure is nothing more than his years doing worker's compensation law, always on behalf of the employee. The experience

of those offered jobs included being law clerks, prosecutors, legal advisors in the Division, fraud investigators, nurses, administrative hearing officers, legal counsel to the Department, Assistant Attorneys General, and Director of the Division. Plaintiff's Exhibit 35 and 57. Plaintiff's one-sided solo practitioner experience representing only employees in worker's compensation matters is not objectively superior to other applicants.

Despite Igoe's suggestion to the contrary, determining who will best conduct themselves as an ALJ necessarily requires assessment of subjective criteria. Any suggestion that a judge can be selected by reference to only objective criteria is ludicrous. An ALJ's job duties include writing, advising, speaking to public groups, and holding hearings. Beyond having an understanding of worker's compensation law, an ALJ must be able to conduct hearings and conferences in a competent and orderly manner and be impartial and fair in his or her demeanor when making decisions in hearings, settlements and conference ratings. Plaintiff's Exhibit 9. The judicial position is hardly the equivalent of the grocery store deli manager position at issue in *McCullough v. Real Foods, Inc.*, 140 F.3d 1123 (8th Cir. 1998), upon which Igoe relies on for his argument that the employer's use of "subjective criteria" supports an inference of pretext. Igoe Brief at 36-37.

Finally, Igoe argues that other older candidates who were objectively better qualified also were not selected.[3] But the only thing, in Igoe's view, that makes them -- or him -- better

[3] This argument would seem to complicate plaintiff's argument that he was the candidate entitled to the job as discussed in Point V below.

qualified is longer experience in the workers' compensation field. As already indicated, however, the amount of experience was not a qualifying or determining factor in the selection of the ALJ and legal advisor. "Time on the job does not always translate into a net performance improvement–which is one of the reasons why general allegations of superior qualifications are legally meaningless." *Ferron v. West*, 10 F. Supp.2d 1363, 1367 (S.D.Ga. 1998). Moreover, the candidates selected in 2000 ranged in age from 30 to 55. Just because there were other older candidates does not mean they all should have been selected or that legally they had to be selected. Igoe presented evidence of one other candidate, Frank Walleman, who filed a charge of discrimination based on the 1997 hiring decisions. In his charge, Mr. Walleman states, "Although the Director of Labor and Industrial Relations interviewed candidates for these positions and made written comments to the governor's office, the decision as to what individuals were hired as administrative law judges and legal advisors was made by the governor." Trial Tr. at 167. Igoe presented no evidence of anything else regarding these candidates or why they weren't selected. Igoe, therefore, never offered substantial evidence to show that he was not selected for any of the positions in 1998 and 2000 because of his age and, in so failing, failed to discharge his burden that the true reason for his non-selection was illegal age discrimination.

IV.

The Circuit Court erred in determining there was retaliation because Igoe did not submit substantial evidence that his nonselection was a direct result of his filing a discrimination charge.

Igoe argues that he presented substantial evidence of a causal connection, or that his nonselection was a direct result of his filing of discrimination charges with the EEOC and the MHRC, sufficient to establish that the Defendants retaliated against him when he was not selected for any position in the Division in 2000. He argues that proof of his allegedly "superior objective qualifications" is sufficient to establish a causal link. See Igoe Brief at 44. But, as previously discussed, Igoe's one-sided solo practitioner experience representing only employees in worker's compensation matters was not objectively superior to the other applicants.

Igoe produced no evidence that retaliatory motive played a role. Indeed, Defendants interviewed Igoe for the position even though he had missed the cut-off date for applications. Igoe's evidence showed nothing more than a decision not to appoint that followed a charge of discrimination. The action did not follow the protected activity so closely in time to justify any inference of a retaliatory motive. *See Feltmann v. Sieben*, 108 F.3d 970, 977 (8th Cir 1997) (discharge six weeks after complaint insufficient to link complaint to discharge).

Perhaps as a result of the lack of evidence of a causal connection, Igoe argues that he established a sufficient causal connection for a *prima facie* case in that he was qualified for the position applied for and was not hired at the next available opportunity. Igoe Brief at 43.

He cites nothing for his novel interpretation of the law that essentially does away with the requirement of a causal connection. That Igoe was not appointed is a separate, already existing, element of his prima facie case of retaliation. That he was qualified for the position, not the most qualified or even more qualified, is of questionable relevance given that he did not establish that the persons who got the job had not also filed charges of discrimination. The result of Igoe's unsupported argument would be that anyone who files a charge of discrimination is automatically in a superior position for the next opening, or else the employer has presumptively engaged in retaliation.

But filing a discrimination charge does not clothe the complainant with immunity for past and present inadequacies and unsatisfactory performance. *Kneibert v. Thomson Newspapers, Michigan Inc.*, 129 F.3d 444, 455 (8th Cir. 1998). The law does not bestow upon previously complaining applicants a superior position over all other applicants with regard to future hiring.

If this were true, a plaintiff could simply claim retaliation because he filed a charge and was not selected. But the courts have required more. Igoe cites *Warren v. Prejean*, 301 F.3d 893 (8th Cir. 2002), in support of his suggestion that proof of a temporal connection to show a causal connection (which he did not have) is not required. In *Warren*, the Eighth Circuit let stand a finding of discrimination when the plaintiff failed to receive a promotion some four and a half years after she had filed a grievance. The Eighth Circuit determined in that case, however, that there was other evidence to support a claim of retaliation. There were several instances where the grievance was mentioned by the plaintiff's supervisors over that four and

a half year period. The court stated that "[t]he key in our consideration is that Warren's evidence ... was not just based on timing, she also provided direct and circumstantial evidence that her termination was retaliatory, and it was the end result of an ongoing pattern of retaliatory behavior." *Warren*, 301 F.3d at 900 (emphasis original).

In contrast, Igoe produced neither timing nor circumstantial evidence to establish a causal link. He argues that because McLucas chose the interview panel for the second round of interviews in 1999, she knew the EEO Officer she selected, and because half the panel -- McLucas and Pfeiffer -- knew of the filing of Igoe's charge, he presented sufficient evidence to show retaliation because of his "extensive experience in workers compensation law."[4] Igoe Brief at 43. It would have only been logical for McLucas to have selected someone for the panel whom she knew. Moreover, there was absolutely no evidence that either of the other two panelists knew about Igoe's filing of a discrimination charge. In addition, even if some members of Governor Carnahan's staff knew about the filing, there are no statements or other actions on the part of any of them to show they were somehow influenced by the filing. Instead the evidence was that McLucas and the panel made recommendations to Governor Carnahan's staff about who they believed should be offered the positions. Igoe was not one of those recommended because he was not viewed by the panel as being one of the best candidates, and

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[4] At the time of this interview in 1999, Igoe had not had a case since 1997. Tr. 36. Despite his now dated experience, Igoe still thought of himself as being in private practice. *Id.*

members of Governor Carnahan's staff made the final decisions. Evidence showing that an employer's retaliatory motive played a part in the adverse employment action is necessary to prove the required causal link. *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002). Igoe offered none.

V.

The Circuit Court erred in granting Igoe equitable relief specifically including instatement to the position of administrative law judge in the City of St. Louis.

Igoe argues that "reinstatement" is the preferred remedy for unlawful discrimination, and cites cases that discuss reinstatement. But reinstatement is critically different from instatement. If a plaintiff is reinstated, the employer, at least at one time, thought that the plaintiff was the right person for the job. That is not so with instatement, particularly in a situation like the present one where over seventy-five applicants applied for the positions. And none of the cases Igoe cites discuss instatement to a judicial position, or to a position from which only the governor can discharge the holder. Even Igoe recognizes that reinstatement is not appropriate in "unusual cases." Igoe Brief at 46. Because of the position at issue, the numerous applicants, the role of Governor Carnahan's office in the selection, and the role of the governor in discharge, this *is* an unusual case. It is one in which the special circumstances justify denying instatement.

Igoe next argues that Defendant offered no evidence to prove that he would not have been hired absent discrimination. Igoe Brief at 47. This argument is ludicrous. The evidence at trial was that Igoe was at the bottom of the rankings of applicants for both ALJ and legal advisor positions. Both McLucas and Pfeiffer testified that they did not think he was one of the better applicants. The interview notes of McLucas and the panel members confirm that both of his interviews were lackluster at best. Igoe argues that this evidence relies on the testimony of non-decision makers. Igoe Brief at 49. But that is precisely the point. Even if

Governor Carnahan's staff did not recommend Igoe for the ALJ position because of his age (an assumption on which Igoe adduced no evidence), taking the Governor's staff out of the equation, McLucas and the panel would not have chosen him for the position. Igoe is not entitled to a windfall in the form of back or front pay, or instatement into a position to which he would not have been appointed absent any discrimination.

Igoe asserts that the circuit court's order of instatement was appropriate regardless of the lack of a vacancy. Igoe Brief at 51. The cases he cites do not support this assertion. Instead, they stand for the proposition that an appropriate remedy is instatement to the next available position with commensurate pay until then. He claims that this is the relief he sought; but recognizes that this was not the relief ordered by the circuit court: "Judge Cohen simply ordered instatement." Igoe Brief at 52. By simply ordering instatement, every day Defendants failed in the impossible directive, they were in violation of the circuit court's improper order.

Igoe claims Defendants did not produce any evidence that instatement would be impracticable. But Defendants produced the ultimate evidence of impracticality–the absence of a vacant position. Defendants cannot create a position for Igoe. The number of ALJ positions is fixed by the legislature. Bumping another ALJ is also not an option, as ALJ's can be "discharged or removed only by the governor pursuant to an evaluation and recommendation by the administrative law judge review committee . . . of the judge's conduct, performance and productivity." §287.610, RSMo. As a result, it was an abuse of the circuit court's discretion to order instatement.

Igoe argues that Defendants separation of powers argument must have been raised in the answer or in the motion for a new trial. Igoe Brief at 55. But separation of powers did not *become* an issue until the circuit court ordered Igoe be instated into an ALJ position. The cases that Igoe cites regarding declaring statutes unconstitutional are not on point. Defendants are not arguing that a statute is unconstitutional. They are arguing that the circuit court's order is violative of important constitutional principles. Defendants are not asking this Court to make the MHRA "toothless for any employee of the executive branch," as Igoe claims. Igoe Brief at 58. They are not asking this Court to declare the MHRA unconstitutional. They are asking this Court to recognize the constitutional problem inherent in the circuit court's order. Here, the circuit court exercised the executive's appointment power with respect to a judicial position. It would not be so very much different if the circuit court had reviewed an appointment to this Court and ordered a different person to the judicial spot. This Court should act to prevent this interference with the executive's selection prerogative.

Igoe misconstrues the statutes and constitution regarding the Department of Labor and Industrial Relations in order to advance his argument that instatement did not violate the separation of powers because, according to Igoe, the Department is "uniquely structured to remain independent of political influence and control."[5] Igoe Brief at 58. He claims the

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[5] The members of the Commission are themselves appointed by the governor, Mo. Const. art. IV, 49, with the advice and consent of the Senate, an inherently political process. *See also* §286.010, RSMo. To suggest as Igoe does that this is an apolitical agency from

Department of Labor is "headed by a three-member Labor and Industrial Relations Commission" and cites to Mo. Const. art. IV § 49. Igoe Brief at 58-59. The Missouri Constitutional provision instead states: "The department of labor and industrial relations shall be in charge of a "Labor and Industrial Relations Commission." Mo. Const. art. IV § 49. The governor appoints the Director of the Department, who is the chief administrative officer of the Department. §286.005, RSMo. Subject to the supervision of the Director of the Department, the Division of Worker's Compensation is supervised and controlled by a Division Director, who is appointed by and reports to the Director of the Department. §286.120, RSMo. The Division Director may appoint ALJs; ALJs may be discharged or removed only by the governor. §287.610, RSMo. The Commission has no role in the appointment of ALJ's. Igoe appears to complain that the Division Director did not make the selections as the statute would normally direct. Of course, in the situation before the Court the Division Director was an applicant for the positions Igoe sought. It cannot have been erroneous for the Department Director to stand in the Division Director's stead under these circumstances and there is no evidence in the record on which any finding could be based that the Division Director, had she not been an applicant for the positions Igoe sought, would have ignored directives from the Governor's office regarding which candidates to select for these positions or that such directives would not have been issued. All of this points to the fundamental lack of even a scintilla of evidence that the Governor's office utilized age as a

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which the governor is far removed is absurd.

factor in their selection decision. Under these circumstances, Igoe simply did not discharge his ultimate burden of demonstrating that his nonselection was based on discrimination or refute the significant constitutional concerns attendant to the trial court's selection and instatement of an Administrative Law Judge.

Finally, Igoe argues that the circuit court's order was not "too specific," because it implemented the findings of the jury. But the jury returned an advisory verdict that was not at all specific and did not find that Igoe was entitled to an ALJ position in the City of St. Louis. The jury's advisory verdict was in favor of Igoe on his claim "for age discrimination against defendants Missouri Department of Labor and Industrial Relations (DOLIR) and Division of Workers Compensation." L.F. at 40. That claim of age discrimination was based on both the ALJ and legal advisor positions. The jury's advisory verdict did not reference a particular position or place. The jury simply assessed damages for lost wages and benefits in an amount of $323,177.10. And, as Igoe testified at trial, he would be willing to work any place in "the state . . . except Poughkeepsie or something." Tr. 90. Limiting the order of instatement to an ALJ position in St. Louis was therefore inappropriate, and should the Court decide to affirm the order of instatement, the relief should be modified to allow instatement as either an ALJ or legal advisor, anywhere in the state.

CONCLUSION

For the reasons stated herein and in defendants opening brief, the order and judgment of the trial court should be vacated with directions to transfer venue. Alternatively, the order and judgement of the circuit court should be reversed because it is inconsistent with the jury's verdict, against the weight of the evidence and because the relief ordered by the circuit court is either impossible, impermissible or inappropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on the 24th day of September, 2004, two true and correct copies of the foregoing brief and two supplemental appendices, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

William E. Moench
2711 Clifton Ave.
St. Louis, Missouri 63139

The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 7,295 words.

The undersigned further certifies that the labeled disk, simultaneously filed herewith has been scanned for viruses and is virus free.

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JAMES ROBERT McADAMS

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